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In The

Supreme Court of the United States

October Term, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Petitioners,

vs.

CITY OF NEDERLAND and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

D. BRENT WELLS
Counsel of Record
JAMES E. CUELLAR
WELLS & HENRY, P.C.
Attorneys for Petitioners
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281

70985 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

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QUESTIONS PRESENTED

I. Whether a showing that a municipality intended to regulate in an area expressly reserved by Congress is a necessary element of a preemption violation which is based upon the effects caused by municipal regulation in a different area.

II. Whether a facially neutral statute that has a discriminatory effect against interstate commerce must be motivated by protectionist intent in order to constitute discrimination under the Dormant Commerce Clause.

III. Whether a Dormant Commerce Clause challenge should be allowed to proceed to trial where there is evidence of a burden on commerce and less burdensome alternatives to achieve the state's purpose.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. Petitioner Texas Manufactured Housing Association, Inc. ("TMHA"), has a single wholly-owned subsidiary named TMHA Services, Inc., which is a for-profit corporation organized under the laws of the State of Texas, engaged principally in the sale of publications and forms for the use of businesses involved in the manufactured housing industry. With the exception of TMHA Services, Inc., TMHA has no parent and no other subsidiaries or affiliates.

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The opinion of the Court of Appeals is reported at 101 F.3d 1095 and is reproduced in the Appendix filed herewith ("App.") at 3a. The opinions of the district court in this case are reported at 905 F.Supp. 371 and are reproduced in the Appendix at 27a and 34a.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on December 26, 1996. On January 9, 1997, Petitioners filed their Petition for Rehearing, which was denied by the Court of Appeals on January 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The pertinent provision of the National Manufactured Housing Construction and Safety Standards Act of 1974, as amended, 42 U.S.C. § 5401 *et seq.*, is set forth below:

> § 5403
>
> (d) Supremacy of Federal standards
>
> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured

home which is not identical to the Federal manufactured home construction and safety standard.

STATEMENT OF THE CASE

This is a case about an individual's freedom to choose the type of single-family dwelling to place on his or her own property. A.J. Waller, Sr. is an elderly resident of the City of Nederland, Texas, a small town in southeast Texas. He has owned and occupied the property which is located at 2120 Helena Avenue for almost forty years. In 1994, Mr. Waller requested a building permit from the City of Nederland to permanently site a new "HUD-code manufactured home" on his property. The home was to replace a "site-built" house which Mr. Waller described as "old" and "dilapidated" and injurious to his health. For sake of clarity, a "HUD-code manufactured home" is distinguished from a "mobile home" in that the former was built after June 15, 1976 and meets preemptive federal construction standards promulgated by the United States Department of Housing and Urban Development; a "mobile home," built before such date, does not. The City denied Mr. Waller's request by citing its Ordinance 259, which prohibits the placement of "trailer coaches" anywhere in the City except in so-called "trailer parks." Mr. Waller appealed the decision to the Zoning Board of Appeals of the City of Nederland, to no avail.

In June of 1994, Mr. Waller, joined and supported by the Texas Manufactured Housing Association, Inc. ("TMHA"), the statewide trade association representing the manufactured housing industry in Texas, filed a complaint in the United States District Court for the Eastern District of Texas. Mr. Waller and TMHA alleged that Ordinance 259 is preempted by federal law, namely, the National Manufactured Housing Construction and

Safety Standards Act of 1974, as amended, 42 U.S.C. § 5401 *et seq.* They also challenged the constitutionality of Ordinance 259, alleging a violation of the Dormant Commerce Clause, a denial of substantive due process and equal protection, takings, and other deprivations of Mr. Waller's civil rights. Subject matter jurisdiction over all these claims was proper under 28 U.S.C. § 1331.

In September of 1995, District Judge Howell Cobb dismissed the entire case by granting the City's motion for summary judgment. In dismissing the federal preemption claim, Judge Cobb focused solely on the purpose of Ordinance 259, finding that "Nederland is not attempting to exclude the plaintiff's mobile home from areas of the city based solely on the city's safety code." 905 F.Supp. at 376 (App. D, 39a) (internal quotation marks and brackets omitted). Regarding the Dormant Commerce Clause challenge, Judge Cobb found that Ordinance 259 does not discriminate against interstate commerce because "Nederland's zoning scheme does not differentiate between HUD-code homes built within the state and those built outside the state." 905 F.Supp. at 379 (App. D, 45a). Judge Cobb then subjected Ordinance 259 to a balancing test, holding that "Ordinance 259 is not unduly burdensome on interstate commerce," especially in light of the "traditional state police power concerns the ordinance addresses." 905 F.Supp. at 379 (App. D, 45a). Judge Cobb found that Ordinance 259 is "simply meant to conserve property values," 905 F.Supp. at 379 (App. D, 45a), but the record reveals that Mr. Waller would have been allowed to install a "modular" home, which is another species of factory-built housing.[1] The record also reveals that a

1. A modular home and a similarly equipped HUD-code manufactured home look virtually identical in terms of their outward visual characteristics. The difference lies in the construction standards to which each is built. Since 1976, all manufactured housing in the United States is built to the HUD code. (Cont'd)

pre-1976 "mobile home" is currently situated on Mr. Waller's property and has been occupied by one of his sons there for many years. Had he chosen to do so, Mr. Waller could have freely replaced that "mobile home" with a "HUD-code manufactured home" without Nederland's approval. *See* Tex. Rev. Civ. Stat. Ann. art. 5221f, § 4A(a) (Vernon Supp. 1996). Finally, the record reveals that the property surrounding Mr. Waller's lot includes a so-called "trailer park" and parcels that are widely divergent in terms of their uses and values. Petitioners filed a Motion for Reconsideration, urging a reexamination of the Dormant Commerce Clause and federal preemption claims. Judge Cobb denied the Motion on October 9, 1995.

On appeal, the United States Court of Appeals for the Fifth Circuit affirmed. In its discussion of the federal preemption claim, the Fifth Circuit relied on the language of Ordinance 259 and found that the Ordinance "does not expressly link its provisions in any way to local safety and construction standards." 101 F.3d at 1100 (App. B, 11a). The court further held that Ordinance 259 does not "affirmatively" discriminate against interstate commerce because it "treats HUD-code manufactured homes built in state identically to those built out of state," and that "the mere fact that a statute has the effect of benefitting a local industry while burdening a separate interstate industry does not in itself establish that the statute is discriminatory." 101 F.3d at 1102 (App. B, 15a). Following this decision, Petitioners filed their Petition for Rehearing and their Suggestion for Rehearing En Banc. Both were denied on January 28, 1997.

(Cont'd)

In contrast, modular housing is regulated at the state level. In Texas, modular housing is built to the Texas modular building code, a code which is itself an amalgamation of various standardized building codes which are locally applied to "site-built" residential construction. *See* Tex. Rev. Civ. Stat. Ann., art. 5221f-1 (Vernon Supp. 1996).

REASONS FOR GRANTING THE WRIT

This Court should grant the writ to resolve a conflict with the Eleventh Circuit's decision in *Scurlock v. City of Lynn Haven, Fla.*, 858 F.2d 1521 (11th Cir. 1988). In *Scurlock*, the Eleventh Circuit held that a local land use ordinance which excluded any structures that were not built to its local building code was tantamount to imposing construction standards on HUD-code manufactured housing in violation of 42 U.S.C. § 5403(d). *Id.*, 858 F.2d at 1525; *see Colorado Manufactured Housing Association v. Board of County Commissioners, etc.*, 946 F.Supp. 1539 (D. Colo. 1996) (same). Attempting to distinguish *Scurlock*, the Fifth Circuit found that Nederland's reason for excluding manufactured housing has nothing to do with the particular standards to which such housing is constructed. 101 F.3d at 1042 (App. B, 11a) (no "link" between exclusion and construction standards). The Fifth Circuit's approach raises the issue of intent: if Nederland's regulatory scheme has the effect of imposing different construction standards on HUD-code manufactured housing in violation of 42 U.S.C. § 5403(d), is Nederland immune from attack simply because it alleges that the imposition of construction standards is not the object of Ordinance 259? Since intent should be irrelevant in preemption analysis, *see, e.g., Florida Lime and Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963) ("The test [is] not whether [the two laws] are aimed at similar or different objectives"), this question must be answered in the negative. Without Nederland's intent, either putative or actual, to serve as the distinguishing characteristic, the Fifth Circuit's ruling is at odds with the Eleventh Circuit's decision in *Scurlock*, 858 F.2d 1521.

Another reason for granting the writ is to decide whether intent is a necessary element of a claim that municipal action violates the Dormant Commerce Clause. This Court has held

that a prima facie violation is stated if there is discrimination against interstate commerce, and in this context discrimination is defined as "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems, Inc. v. Dept. of Environmental Quality, etc.*, 511 U.S. 93, 99 (1994). In many cases, differential treatment is motivated by protectionist intent, and, as a consequence, this Court has never been called upon to decide whether differential treatment that is alleged not to be motivated by protectionist intent still qualifies as "discrimination" under the Dormant Commerce Clause. The Fifth Circuit's opinion in this case effectively requires an affirmation of protectionist intent when it holds that a statute which "merely" creates uneven effects (*i.e.*, favors intrastate over interstate commerce) is not discriminatory. 101 F.3d at 1102 (App. B, 15a). This result, however, does not follow from this Court's jurisprudence in this area. Moreover, requiring proof of protectionist intent undermines the broad purpose to be served by enforcing the dormant aspect of the Commerce Clause.

Yet another reason for granting the writ is for this Court to establish a uniform rule for adjudicating Dormant Commerce Clause challenges under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). At present, the courts of appeals are divided on whether the *Pike* test can be applied as a matter of law at the summary judgment stage, or whether the factual components of the *Pike* test require a trial on the merits.

I.

WHERE A MUNICIPALITY'S REGULATORY SCHEME HAS THE EFFECT OF ENCROACHING UPON AN AREA EXPRESSLY RESERVED BY CONGRESS, A SHOWING THAT THE MUNICIPALITY INTENDED TO CREATE THE EFFECT IS NOT A NECESSARY ELEMENT OF A PREEMPTION VIOLATION.

When analyzing whether a particular statute is preempted by an act of Congress, the statute's putative purpose is not necessarily dispositive. In *Florida Lime*, 373 U.S. 132, this Court held that the "test [is] not whether [the two laws] are aimed at similar or different objectives." 373 U.S. at 142. This rule acknowledges that a statute designed to operate in one substantive area can have demonstrative effects in another. *See, e.g., Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 388 (1992)(regulating advertising affects rates); *see also Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) (common law damages actions have the effect of imposing affirmative requirements). Accordingly, when conducting preemption analysis, this Court examines "state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 526 (1977).

The Fifth Circuit's opinion in this case ignored these principles and focused solely on Nederland's avowed purpose for excluding manufactured housing. The court apparently felt compelled to do so because this case is otherwise identical to the situation presented in *Scurlock*, 858 F.2d 1521. In *Scurlock*, a local land use ordinance required all homes which were situated in a particular zoning district to be constructed to the local building code. The ordinance, which was of general application, did not affirmatively impose building standards on HUD-certified manufactured homes. Nevertheless, the Eleventh

Circuit correctly held that linking inclusion to compliance with the local building code was tantamount to imposing construction standards on HUD-certified manufactured housing in violation of 42 U.S.C. § 5403(d). 858 F.2d at 1525. To distinguish *Scurlock*, the Fifth Circuit focused on the "linkage" issue and concluded that Nederland's reason for excluding manufactured housing has nothing to do with the particular standards to which such housing is constructed. 101 F.3d at 1100 (App. B, 11a).[2] By relying upon Nederland's reason for exclusion to decide the federal preemption question, the Fifth Circuit's approach is erroneous.[3] More importantly, if Nederland's intent is removed from consideration, as it properly should be, then the situation in Nederland is identical to the situation in Lynn Haven, and the Fifth Circuit's opinion in this case conflicts with the Eleventh Circuit's decision in *Scurlock*, 858 F.2d 1521.

By resolving this conflict with *Scurlock*, this Court will also bring order to an area of the law which is becoming increasingly crowded with irreconcilable decisions. In addition to the

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2. Petitioners' theory of "linkage" is that Nederland's acceptance of one form of factory-built housing (modular housing) and simultaneous exclusion of another (HUD-code manufactured housing) amounts to the imposition of construction standards on the latter when the only meaningful distinction between the two housing types is the building code to which each is constructed. This theory, supported by a 2,000-page summary judgment record, was ignored by the Fifth Circuit, which found that Nederland's "reason" for excluding manufactured housing is, simply, obedience to an ordinance which calls for the exclusion. 101 F.3d at 1100 (App. B, 11a).

3. The Fifth Circuit compounded its error by assuming that the purely economic purpose behind Ordinance 259 (*i.e.*, preserving surrounding property values) constitutes a weighty exercise of the police power which demands a high degree of deference. This Court's preemption cases, however, demonstrate that the degree of deference suggested by the Fifth Circuit is reserved for health or safety measures. *See, e.g., Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985).

Eleventh Circuit's decision in *Scurlock*, federal district courts in Colorado and Georgia have held that exclusionary zoning ordinances which discriminate against HUD-certified manufactured housing are preempted by federal law (42 U.S.C. § 5403(d)). *See Colorado Manufactured*, 946 F.Supp. 1539; *Georgia Manufactured Housing Association, Inc. v. Spalding County, Ga.*, No. 3:94-CV-51-GET (N.D. Ga., unreported, June 13, 1996). These preemption decisions join the growing number of other cases which have been decided under various constitutional theories, with mixed results. *See, e.g., Bourgeois v. Parish of St. Tammany, La.*, 628 F.Supp. 159 (E.D. La. 1986) (ordinance stricken under substantive due process); *Georgia Manufactured* (ordinance stricken under commerce clause, substantive due process, and equal protection); *Grant v. County of Seminole, Fla.*, 817 F.2d 731 (11th Cir. 1987) (case dismissed despite substantive due process and equal protection challenges). The constitutionality of exclusionary zoning against manufactured housing is far from settled, and the future portends further legal challenges. Manufactured housing built to preemptive federal standards, which accounted for one-fourth of all the single-family houses that were built in this country in 1995, plays a strategic role in the Clinton Administration's efforts to increase homeownership.[4] Given the inconsistent pattern of decisions emanating from the federal courts, the federal superintendence of the manufactured housing industry, the federal priority of homeownership, and the federal nature of the legal issues involved, a single, unifying resolution by this Court is urgently needed at this time.

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4. *The National Homeownership Strategy: Partners in the American Dream* (1995) (working paper prepared by United States Department of Housing and Urban Development) (App. E).

II.

WHERE A FACIALLY NEUTRAL STATUTE DISCRIMINATES AGAINST INTERSTATE COMMERCE IN ITS PRACTICAL EFFECT, PROOF OF PROTECTIONIST INTENT IS NOT REQUIRED IN ORDER TO ESTABLISH DISCRIMINATION UNDER THE DORMANT COMMERCE CLAUSE.

In enforcing the "dormant" aspect of the Commerce Clause, this Court has never required proof of protectionist intent as a precondition for finding that a statute discriminates against interstate commerce. *See, e.g., Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 352 (1977) (there is no need to "ascribe an economic protection motive" to find discrimination). The reason for not requiring protectionist intent lies in the political theory underlying the Commerce Clause. The Commerce Clause was designed to promote national solidarity, to reduce the incidence of regional jealousies and retaliatory measures which result from economic protectionism. *See, e.g., C & A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 390 (1994); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 522 (1935). It is the threat to national solidarity, not the economic effects of protectionism *per se*, that is the real danger addressed by the Dormant Commerce Clause. Accordingly, if effects resembling economic protectionism are felt, then the danger of retaliatory reprisals will not be lessened in the slightest merely because the effects result from measures which, in fact, were not motivated by protectionism. Intent, therefore, is too narrow to serve as the focal point; instead, the proper focus should be on the regulation's effect in the marketplace.

In derogation of these principles, the Fifth Circuit's view is that differential treatment, standing alone, is insufficient to merit close scrutiny under the Dormant Commerce Clause. According

to the Fifth Circuit, "the mere fact that a statute has the effect of benefitting a local industry while burdening a separate interstate industry does not in itself establish that the statute is discriminatory." 101 F.3d at 1102 (App. B, 15a). This statement, of course, is incongruous with the *Oregon Waste Systems* model of discrimination, which classifies all instances of differential treatment as discrimination. *Id.*, 114 S.Ct. at 1350. As if to justify its radical departure from this binding precedent, the Fifth Circuit emphasized the facial neutrality of Ordinance 259[5] and its status as simply a "land use" regulation (to be distinguished, presumably, from a purely protectionist measure). The Fifth Circuit's underlying rationale seems to be that, in the absence of protectionist intent, a statute which creates uneven effects in the marketplace should not be subjected to the same level of scrutiny as outright economic protectionism.[6]

This Court has never seen fit to draw a line between discrimination which is intended to be protectionist and discrimination which is without a protectionist purpose. This Court has assumed all along that even the "legitimate" exercise of the police power can produce protectionist effects, *see, e.g., Maine v. Taylor*, 477 U.S. 131 (1986), and, as a consequence, such measures are entitled to deferential review only if "there

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5. The Fifth Circuit found that Nederland's discrimination against HUD-code manufactured homes is not "affirmative" discrimination since all such homes, regardless of place of manufacture, are excluded. 101 F.3d at 1102 (App. B, 15a-16a). This Court has never accepted this type of defense as dispositive of the discrimination question. *See, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 361 (1992); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951).

6. Discrimination must be justified under strict scrutiny, *see, e.g., Fulton Corp. v. Faulkner*, __ U.S. __, 116 S.Ct. 848, 861 (1996), whereas nondiscriminatory measures are analyzed under the balancing test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

is no patent discrimination against interstate trade." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). To ascertain whether a statute produces protectionist effects, the critical inquiry is whether the statute operates to lessen competition in a given market between interstate and intrastate commerce. *See, e.g., General Motors Corporation v. Tracy*, 117 S.Ct. 811 (1997)(removal of the challenged regulation would not promote competition); *see also Toomer v. Witsell*, 334 U.S. 385, 403-04 (1948) (statute which "impose[s] an artificial rigidity on the economic pattern of the industry" is offensive).[7] By exempting "non-protectionist" discrimination from strict scrutiny, even though the effects it produces are the same as economic protectionism, the Fifth Circuit's approach undermines the effectiveness of the Dormant Commerce Clause by increasing the likelihood of regional jealousies and reprisals.

III.

WHERE THERE IS EVIDENCE OF A BURDEN ON INTERSTATE COMMERCE AND LESS BURDENSOME ALTERNATIVES TO ACHIEVE THE STATE'S PURPOSE, SUMMARY JUDGMENT IS INAPPROPRIATE TO DISPOSE OF A DORMANT COMMERCE CLAUSE CHALLENGE.

Another reason for granting the writ is to resolve a split among the courts of appeals in their approach to applying the undue burden test articulated in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), at the summary judgment level. The Seventh, Eighth, and Tenth Circuits acknowledge that the *Pike* test is fact-intensive and inappropriate for summary judgment. *See National*

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7. In Nederland, removing the ban on HUD-code manufactured homes would naturally increase competition in the residential housing market by offering a second, viable option to those consumers who desire to place a factory-built home on their privately-owned lots.

Solid Wastes Management Ass'n v. Meyer, 63 F.3d 652 (7th Cir. 1995), *cert. denied*, 116 S.Ct. 1351 (1996); *Cotto Waxo Company v. Williams*, 46 F.3d 790 (8th Cir. 1995); *Blue Circle Cement, Inc. v. Board of County Commissioners, etc.*, 27 F.3d 1499 (10th Cir. 1994). On the other hand, the First, Fourth, Sixth, Ninth, and Eleventh Circuits, in addition to the Fifth Circuit's opinion in this case, have applied the *Pike* test to affirm summary judgments in favor of the challenged regulation. *See New Hampshire Motor Transport Ass'n v. Town of Plaistow*, 67 F.3d 326 (1st Cir. 1995), *cert. denied*, 116 S.Ct. 1352 (1996); *Medical Waste Associates Limited Partnership v. Mayor and City Council of Baltimore*, 966 F.2d 148 (4th Cir. 1992); *Ferndale Laboratories, Inc. v. Cavendish*, 79 F.3d 488 (6th Cir. 1996); *Kleenwell Biohazard Waste and General Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391 (9th Cir.), *cert. denied*, 115 S.Ct. 2580 (1995); *Kirkpatrick v. Shaw*, 70 F.3d 100 (11th Cir. 1995).

The middle ground between these polar extremes seems most appropriate. Where there is no burden on interstate commerce, there is nothing to balance, and summary judgment is proper. This seems to be the approach of the Second and Third Circuits. *See Gary D. Peake Excavating, Inc. v. Town Bd. of Town of Hancock, N.Y.*, 93 F.3d 68 (2d Cir. 1996); *Instructional Systems, Inc. v. Computer Curriculum Corp.*, 35 F.3d 813 (3rd Cir. 1994), *cert. denied*, 115 S.Ct. 1176 (1995); *Old Bridge Chemicals, Inc. v. New Jersey Dept. of Environmental Protection*, 965 F.2d 1287, 1295 (3d Cir.), *cert. denied*, 506 U.S. 1000 (1992) ("the regulations imposed no burden on interstate commerce").

On the other hand, where there is evidence of a burden on interstate commerce, the burden must be weighed according to the formula articulated in *Pike*. If all that *Pike* required was a balancing of the local and federal interests, courts would be free to decide as a matter of "policy" that the public interest outweighs the burden on interstate commerce, regardless of

magnitude and regardless of how well the challenged regulation furthers the public interest. *See, e.g., Electrolert Corp. v. Barry*, 737 F.2d 110 (D.C.Cir. 1984) (non-illusory safety regulations should not be balanced at all). *Pike*, of course, has a third element, which is that courts must take into account the availability of less burdensome measures the state could adopt to achieve its objectives. If the non-moving party fails to propose less burdensome alternatives, then, faced with only a balancing of competing interests, courts would still be free to make their policy decisions at the summary judgment level. If, however, evidence of less burdensome alternatives is offered by the non-moving party, and if the alternatives are not illusory, then the balancing takes on a "feasibility" dimension which reduces the "policy" aspects of the decision, and summary disposition under such circumstances is manifestly unjust. Accordingly, where there is evidence of a burden on commerce,[8] and where there is evidence of less burdensome alternatives,[9] the case should be allowed to proceed to trial.

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8. In the instant case, the district judge acknowledged that Ordinance 259 burdens interstate commerce, 905 F.Supp. at 379 (App. D, 45a) and 381 (App. C, 32a), and Petitioners quantified the burden ($943,000 in lost sales over a four-year period). The Fifth Circuit acknowledged the lost sales but found that, because Texas firms suffer proportionately in those losses, interstate commerce does not suffer a "net" loss, and therefore, there is no burden on interstate commerce. 101 F.3d at 1104 (App. B, 19a- 20a). The fact that Nederland's exclusion hurts Texas firms, however, does not dispose of the discrimination question. *See Fort Gratiot Sanitary Landfill, Inc. v. Michigan Department of Natural Resources*, 504 U.S. 353, 361 (1992); *Dean Milk Co. v. Madison*, 340 U.S. 349, 354 n.4 (1951).

9. Petitioners introduced evidence of alternative methods of protecting property values other than the wholesale exclusion of HUD-certified manufactured housing, but this evidence was neither acknowledged nor considered by the district judge, 905 F.Supp. at 379 (App. D, 45a) and 381 (App. C, 32a), and it was deemed irrelevant by the Fifth Circuit because it found no burden on interstate commerce. 101 F.3d at 1104 (App. B, 19a-20a).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

D. BRENT WELLS
Counsel of Record
JAMES E. CUELLAR
WELLS & HENRY, P.C.
Attorneys for Petitioners
440 Louisiana, Suite 718
Houston, Texas 77002
(713) 222-1281

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT FILED JANUARY 28, 1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-40803

TEXAS MANUFACTURED HOUSING ASSOCIATION INC; A J WALLER, SR

Plaintiffs - Appellants

v.

NEDERLAND CITY OF; ZONING BOARD OF APPEALS, CITY OF NEDERLAND

Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Texas, Beaumont

PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 12/26/96, 5 Cir., 1996, F.3d)

Before KING, HIGGINBOTHAM, Circuit Judges, and KAZEN,* District Judge.

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* District Judge for the Southern District of Texas, sitting by designation

Appendix A

PER CURIAM:

(x) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

* * *

ENTERED FOR THE COURT:

s/ Carolyn Dineen King
United States Circuit Judge

CLERK'S NOTE:
SEE FRAP AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE.

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DATED DECEMBER 26, 1996

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC.; A.J. Waller, Sr., Plaintiffs-Appellants

v.

NEDERLAND, CITY OF; Zoning Board of Appeals, City of Nederland, Defendants-Appellees.

No. 95-40803.

United States Court of Appeals,
Fifth Circuit

Dec. 26, 1996

* * *

Appeals from the United States District Court for the Eastern District of Texas.

Before KING and HIGGINBOTHAM, Circuit Judges, and KAZEN,* District Judge.

KING, Circuit Judge:

Plaintiffs appeal a grant of summary judgment in favor of defendants on plaintiffs' multiple claims challenging a city

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* District Judge for the Southern District of Texas, sitting by designation.

ordinance that regulates the placement of manufactured housing[1] within city limits. Finding no genuine issues of material fact as to any of plaintiffs' claims, we affirm.

I. BACKGROUND

In 1970, the City of Nederland (the "City") adopted Ordinance 259, which prohibits the placement of "trailer coaches" on any lot within city limits except in a "duly authorized trailer park." Ordinance 259 defines "trailer coach" as "a transportable, single family dwelling unit which is or may be mounted on wheels suitable for year-round occupancy and containing the same water supply, waste disposal and electrical conveniences as immobile housing."

In 1994, A.J. Waller, Sr. ("Waller") applied to the City for a permit to place a "HUD-code manufactured home" on a lot that he had owned and occupied in Nederland since 1959. Under Texas law, a "HUD-code manufactured home" has characteristics identical to those of a mobile home except that a HUD-code manufactured home is built after June 15, 1976, and is constructed according to HUD standards. *See* Tex.Rev.Civ.Stat.Ann. art. 5221f § 3 (Vernon Supp. 1997).[2]

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1. In this opinion, the term "manufactured housing" refers collectively to "HUD-code manufactured homes" and "mobile homes," as those terms are defined under Texas law. *See infra* note 2.

2. The Manufactured Housing Standards Act provides in relevant part:

> Sec. 3. Whenever used in this Act, unless the context otherwise requires, the following words and terms have the following meanings:

(Cont'd)

Appendix B

Waller intended to install the home on a permanent foundation system. The home would have replaced an aging, dilapidated, site-built home that Waller was then occupying.

(Cont'd)

> (1) "Mobile home" means a structure that was constructed before June 15, 1976, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems.
>
> (17) "Manufactured housing" or "manufactured home" means a HUD-code manufactured home or a mobile home and collectively means and refers to both.
>
> (19) "HUD-code manufactured home" means a structure, constructed on or after June 15, 1976, according to the rules of the United States Department of Housing and Urban Development, transportable in one or more sections, which, in the traveling mode, is eight body feet or more in width or 40 body feet or more in length, or, when erected on site, is 320 or more square feet, and which is built on a permanent chassis and designed to be used as a dwelling with or without a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air-conditioning, and electrical systems. The term does not include a recreational vehicle as that term is defined by 24 C.F.R. Section 3282.8(g)

Tex.Rev.Civ.Stat.Ann. art. 5221f § 3 (Vernon Supp. 1997). These definitions of "mobile home" and "HUD-code manufactured home" track the federal definition of "manufactured home." *See* 42 U.S.C. § 5402(6).

Appendix B

The City determined that a HUD-code manufactured home was a "trailer coach" and denied Waller's application under Ordinance 259. Waller appealed to the Zoning Board of Appeals of the City of Nederland ("Zoning Board"). After a public hearing, the Zoning Board affirmed the City's denial of Waller's permit application.

The City and the Zoning Board have interpreted Ordinance 259 to include both HUD-code manufactured homes and mobile homes but not "industrialized" or "modular" homes. An "industrialized" or "modular" home is built off-site in modular components that are then transported to a residential site and erected on a permanent foundation.[3] Unlike manufactured housing, modular housing is not built on a permanent chassis

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3. "Industrialized housing" is defined under Texas law as:

> a residential structure that is designed for the use and occupancy of one or more families, that is constructed in one or more modules or constructed using one or more modular components built at a location other than the permanent residential site, and that is designed to be used as a permanent residential structure when the modules or modular components are transported to the permanent residential site and are erected or installed on a permanent foundation system. . . . The term shall not mean nor apply to (i) housing constructed of sectional or panelized systems not utilizing modular components; or (ii) any ready-built home which is constructed so that the entire living area is contained in a single unit or section at a temporary location for the purpose of selling it and moving it to another location.

Tex.Rev.Civ.Stat.Ann. art. 5221f-1 § 1(1) (Vernon 1987).

and must be constructed according to local building code standards. *See* Tex.Rev.Civ.Stat.Ann. art. 5221f-1 § 2 (Vernon 1987). The distinction between manufactured housing and modular housing is at the heart of plaintiffs' constitutional claims.

Waller and the Texas Manufactured Housing Association ("TMHA") (collectively, "plaintiffs") filed suit against the City and Zoning Board on June 29, 1994, challenging the enforcement of Ordinance 259 as discriminatory and unconstitutional. Plaintiffs claimed that defendants' actions amounted to a constitutional tort as well as a denial, under the United States Constitution, of substantive due process, equal protection, just compensation, privileges and immunities, and privacy. Plaintiffs also claimed that enforcement of Ordinance 259 impermissibly burdened interstate commerce and that both federal and state law preempted the subject matter of the ordinance. Plaintiffs sought relief for alleged constitutional violations both directly and under 42 U.S.C. § 1983.

On September 7, 1995, the district court granted summary judgment in favor of defendants on all claims. The district court denied plaintiffs' motion for reconsideration.

On appeal, plaintiffs argue that the district court erred in granting summary judgment for defendants on plaintiffs' preemption, commerce clause, takings, substantive due process, equal protection, and § 1983 claims, and in granting defendants' motion to extend time for filing a motion for attorneys' fees.

II. STANDARD OF REVIEW

We review a grant of summary judgment de novo, applying the same criteria used by the district court in the first instance.

Norman v. Apache Corp., 19 F.3d 1017, 1021 (5th Cir. 1994); *Conkling v. Turner*, 18 F.3d 1285, 1295 (5th Cir. 1994). Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 327, 106 S.Ct. 2548, 2554, 91 L.Ed.2d 265 (1986). After the movant has presented a properly supported motion for summary judgment, the burden shifts to the nonmoving party to show with "significant probative evidence" that there exists a genuine issue of material fact. *See Conkling*, 18 F.3d at 1295. A fact is "material" if its resolution in favor of one party might affect the outcome of the lawsuit under governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). An issue is "genuine" if the evidence is sufficient for a reasonable jury to return a verdict for the nonmoving party. *Id.*

III. DISCUSSION

A. *Preemption*

1. *Federal preemption*

The doctrine of federal preemption is rooted in the Supremacy Clause and activated by congressional intent. *See Fidelity Federal Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 152-53, 102 S.Ct. 3014, 3022, 73 L.Ed.2d 664 (1982). Congress may either expressly define the extent to which state law is to be preempted by a federal statute, or implicitly preempt state law by regulating comprehensively so as to preclude state law from occupying any part of the regulated field. *Id.* Even

where Congress has not entirely regulated a specific area, state law will be nullified to the extent it directly conflicts with federal law or hinders achievement of congressional objectives. *Id.; see also Hetzel v. Bethlehem Steel Corp.*, 50 F.3d 860, 363 (5th Cir. 1995).

Plaintiffs argue that Ordinance 259 is preempted by the National Manufactured Housing Construction and Safety Standards Act of 1974 (the "Act"), 42 U.S.C. §§ 5401-5426, which expressly prohibits state and local governments from establishing standards for the safety and construction of manufactured homes that differ from federal standards. *See* 42 U.S.C. § 5403(d).[4] Plaintiffs base their argument on isolated portions of testimony of City officials that purportedly establish that a HUD-code manufactured home would not be an acceptable structure on a private residential lot outside a trailer park because such a home would not comply with the "local building

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4. This section provides:

> Whenever a Federal manufactured home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any manufactured home covered, any standard regarding construction or safety applicable to the same aspect of performance of such manufactured home which is not identical to the Federal manufactured home construction and safety standard.

42 U.S.C. § 5403(d).

code."[5] Plaintiffs contend that this testimony raises a fact issue concerning whether Ordinance 259 imposes local safety and construction standards on HUD-code manufactured homes in contravention of the express will of Congress.

Plaintiffs rely on *Scurlock v. City of Lynn Haven*, 858 F.2d 1521 (11th Cir. 1988), in which a permit to place a HUD-code manufactured home in one of the city's residential districts was denied because a local ordinance prohibited the placement in such a district of any home that did not comply with specified local codes. *Id.* at 1522-23. The Eleventh Circuit held that the ordinance was preempted because it attempted to impose greater safety requirements for manufactured homes than those mandated by the federal statute. *Id.* at 1525.

We agree with the district court that this case is significantly unlike *Scurlock*. The ordinance at issue in *Scurlock* excluded from certain residentially-zoned property any home that either did not meet the Southern Standard Building Code, the National Electrical Code, and the Electrical Code of the City of Lynn Haven, or did not bear the seal of the Florida Department of Community Affairs. As recognized by the Eleventh Circuit, the City of Lynn Haven was "attempting to exclude the Scurlock's mobile home from its R-AA section based *solely* on its safety code." *Id.* (emphasis added). Accordingly, much of the evidence at trial concerned the differences between HUD requirements

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5. "Local building code" is the term that plaintiffs use in their brief. The depositions relied on by plaintiffs include various references to "local building code," "Standard Building Code," and "Southern Building Code." Plaintiffs do not define these terms. However, because plaintiffs frame their argument using the term "local building code," we use this term in our discussion. We suggest no view as to the distinctions that may or may not exist among the various terms.

and those contained in the specified codes. *Id.* at 1523. Ordinance 259, in contrast, regulates the placement and permitting of trailer coaches for the purpose of protecting property values and does not expressly link its provisions in any way to local safety and construction standards.

In *Scurlock,* the evidence showed that a HUD-code home would be permitted in the areas in question as long as it complied with local safety and construction codes (which imposed requirements different from and more stringent than HUD requirements), *irrespective of any other applicable local regulations.* The evidence in this case does not establish this specific, key fact. Plaintiffs have not cited evidence that identifies the actual requirements of the "local building code" that HUD-code manufactured homes fail to satisfy under the ordinance. This omission is fatal to plaintiffs' claim that the ordinance is a thinly veiled attempt to impose local safety and construction standards on HUD-code manufactured homes. The relevant deposition testimony, taken as a whole, does not distinguish between local safety and construction standards and all other aspects of local building regulation (including the ordinance at issue in this case). Therefore it does not create a genuine issue of material fact as to whether enforcement of Ordinance 259 conflicts with federal law. The district court properly granted summary judgment on plaintiffs' federal preemption claim.

2. *State preemption*

Plaintiffs also argue that Ordinance 259 is preempted by the Texas Manufactured Housing Standards Act, Tex. Rev.Civ.Stat.Ann. art. 5221f. This statute specifically allows cities to restrict installation of HUD-code manufactured homes to "areas determined appropriate by the city."

Tex.Rev.Civ.Stat.Ann. art. 5221f § 4A(b) (Vernon Supp. 1997). Plaintiffs contend, however, that Ordinance 259 is preempted by section 3A of article 5221f because Ordinance 259 treats the terms "HUD-code manufactured home" and "mobile home" "as functional equivalents under the outdated (1970) rubric of 'trailer coach,' " whereas section 3A provides that the terms are mutually exclusive and binding on every political subdivision in Texas.

Plaintiffs are correct that section 3A makes the definitions of manufactured housing contained in article 5221f binding on all local political subdivisions of the state. Section 3A also states that "[a] mobile home is not a HUD-code manufactured home and a HUD-code manufactured home is not a mobile home for any purpose under the laws of this state." Tex.Rev.Civ.Stat.Ann. art. 5221f § 3A (Vernon Supp. 1997). Nothing in article 5221f, however, precludes a municipality from regulating both types of manufactured housing using a single term such as "trailer coach." Ordinance 259 does not impermissibly regulate either mobile homes or HUD-code manufactured homes, and the district court properly granted summary judgment on the state preemption claim.

B. *Commerce Clause*

The dormant commerce clause confines the states' power to burden interstate commerce. *Oregon Waste Sys., Inc. v. Oregon Dep't Envtl. Quality*, 511 U.S. 93, 114 S.Ct. 1345, 128 L.Ed.2d 13 (1994). The first step in analyzing the constitutionality of legislation under the dormant commerce clause is to determine "whether the challenged statute regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce either on its face or in practical

effect." *Hughes v. Okla.*, 441 U.S. 322, 336, 99 S.Ct. 1727, 1736, 60 L.Ed.2d 250 (1979); *see also Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L.Ed.2d 110 (1986). The Supreme Court has defined "discrimination" in this context to mean "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Systems*, 511 U.S. at __, 114 S.Ct. at 1350. As the Court has alternatively formulated this initial step, "[t]he crucial inquiry . . . must be directed to determining whether [the statute] is basically a protectionist measure, or whether it can fairly be viewed as a law directed to legitimate local concerns, with effects upon interstate commerce that are only incidental." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624, 98 S.Ct. 2531, 2535, 57 L.Ed.2d 475 (1978).

A statute that burdens interstate commerce only incidentally is subject to the flexible balancing approach of *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 90 S.Ct. 844, 25 L.Ed.2d 174 (1970), which provides that such a statute "will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142, 90 S.Ct. at 847. The *Pike* Court went on to state that "[i]f a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities." *Id.*

Statutes that affirmatively discriminate against interstate commerce are subject to stricter scrutiny. The party challenging the statute bears the initial burden of showing discrimination. *Hughes*, 441 U.S. at 336, 99 S.Ct. at 1736. Once discrimination has been demonstrated, the burden shifts to the state to

demonstrate both that the statute serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means. *Id.*

Plaintiffs argue that the district court erred in applying the balancing test set forth in *Pike* because Ordinance 259 discriminates against interstate commerce in its practical effect and therefore should have triggered strict scrutiny under *Hughes.* Plaintiffs contend that HUD-code manufactured housing is an out-of-state economic interest because many such homes are fabricated outside of Texas and imported into the state, while modular housing is an in-state economic interest because the modular homes that are sold to Texas consumers are constructed in Texas. Plaintiffs offered the affidavit of their expert, Will Ehrle, President and General Counsel of TMHA, who stated that because modular housing must meet the state building code and because of "practicalities of the market," the construction and sale of modular housing is, at least in Texas, a "distinctly local industry." Ehrle further stated that he was not aware of any manufacturer outside of Texas that sells and ships modular homes to Texas. Based on these facts, Plaintiffs contend that Ordinance 259 discriminates against interstate commerce because it prohibits the placement of HUD-code manufactured homes on individual, privately-owned lots in the City while permitting modular homes, which compete in an overlapping market, to be placed on such lots. Plaintiffs argue that an in-state economic interest is thereby benefited while an out-of-state economic interest is burdened.

The facts of this case most closely resemble those of *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981), cited by defendants. In *Clover Leaf,* the Supreme Court upheld a Minnesota statute banning retail

sale of milk in plastic nonreturnable, nonrefillable containers, but permitting sale in other nonreturnable, nonrefillable containers, such as paperboard cartons. The purpose of the statute was to promote conservation and ease solid waste management problems. Plaintiff dairy companies argued that the statute impermissibly burdened interstate commerce because the plastic resin used to make the plastic containers was produced entirely by out-of-state firms, while pulpwood, used to make the paperboard milk cartons that would replace the banned plastic containers, was a major in-state product. The statute effectively burdened the non-Minnesota plastic resin manufacturers while providing a boon to the Minnesota pulpwood industry. The Court held, first, that the statute did *not* discriminate against interstate commerce but regulated evenhandedly because it prohibited *all* milk retailers from selling their products in plastic, nonreturnable containers, without regard to whether the milk, the containers, or the sellers were from outside the state. The Court therefore applied the *Pike* balancing test and held, second, that the burden imposed on interstate commerce was relatively minor and not clearly excessive in light of the "substantial" state interest in promoting conservation and easing solid waste disposal problems.[6] 449 U.S. at 472-73, 101 S.Ct. at 728-29.

Clover Leaf thus stands for the proposition that the mere fact that a statute has the effect of benefitting a local industry while burdening a separate interstate industry does not in itself establish that the statute is discriminatory. *Clover Leaf* supports defendants' position that Ordinance 259 does not affirmatively

6. The Court so held despite state district court findings, based on extensive evidentiary hearings, that the statute would not be able to achieve its stated policy objectives and that the actual basis for the statute was to promote local economic interests in the dairy and pulpwood industries. The Court examined the record and drew contrary conclusions from the evidence.

discriminate because it treats HUD-code manufactured homes built in state identically to those built out of state.

In another relevant case, *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978), the Court upheld a Maryland statute providing that producers or refiners of petroleum products may not operate any retail service station within the state. The purpose of the statute was to correct inequities in the distribution and pricing of gasoline. Because no producers or refiners operated within the state, the burden of the regulation fell entirely on interstate companies. The Court rejected the argument that this fact established that the statute discriminated against interstate commerce, reasoning that the in-state independent dealers were still subject to competition from out-of-state petroleum marketers that owned and operated retail gas stations but did not produce or refine petroleum and therefore were not bound by the statute. Because the statute did not erect barriers against interstate independent dealers and did not prohibit the flow of interstate goods, place added costs on them, or distinguish between in-state and out-of-state companies in the retail sector, the Court held that it had no discriminatory effect. *Id.* at 126, 98 S.Ct. at 2214.

In contrast to the facts of *Clover Leaf* and *Exxon*, in which the benefitted industry did not exist solely within the regulating state, plaintiffs contend that modular housing that could potentially serve the Nederland market originates solely within Texas. Plaintiffs' evidence on this point is limited to the Ehrle affidavit, noted above. Defendants apparently offered no evidence in response. The City's amici, however, note in their brief that the Texas statute regulating modular housing,[7]

7. The present statute uses the term "industrialized" for what we refer to as "modular" housing.

Appendix B

Tex.Rev.Civ.Stat.Ann. art. 5221f-1 (Vernon Supp. 1997), specifically contemplates the interstate sale and installation of modular homes. Section 4(c) of article 5221f-1 expressly permits the state commissioner of licensing and regulation to authorize building inspections of modular housing constructed in another state to be performed by an inspector counterpart in the other state and also to authorize inspections of modular housing that is constructed in Texas for use in another state. This provision is not inconsistent with Ehrle's affidavit testimony, which does not foreclose the possibility that modular housing could be constructed out of state and installed in state.[8]

Section 2(a) of article 5221f-1, moreover, requires that modular housing meet the requirements of the National Electrical Code and the requirements of whichever of two specified uniform building codes (the Uniform Building Code and the Standard Building Code) has been adopted by the municipality in which the housing is erected or installed. Section 2(b) provides that if the municipality has not adopted either of the specified codes, or if the housing is created or installed outside a municipality, the housing must be constructed in accordance with whichever of the two codes the manufacturer chooses. These provisions tend to erode plaintiffs' argument that modular housing is a "distinctly local industry" in part because it must conform to a local building code; in this context, the local code must itself conform to certain standards used throughout the nation.

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8. We note that the City of Nederland is within close proximity to the Louisiana border and a major interstate highway. Presuming that transportation is a relevant "practicality of the market," it is not at all implausible that modular housing constructed in Louisiana could be transported to Nederland at least as conveniently as modular housing constructed elsewhere in Texas.

Appendix B

Plaintiffs' attempt to demonstrate that Ordinance 259 has a discriminatory, rather than incidental, effect on interstate commerce is flawed in two respects. First, Ordinance 259 does *not* place any restrictions on out-of-state modular housing, and plaintiffs' evidence, even accepted as true as it must be here, does not show that modular housing is inherently such that it cannot be sold interstate. To the contrary, interstate sale of modular homes was expressly contemplated by the state legislature, and the potential for significant variations among local building codes throughout the state is minimal. Because Ordinance 259 creates no barriers to the free flow of modular homes to and from Texas, the facts of this case mirror those of *Clover Leaf* and *Exxon*.

Second, plaintiffs' own evidence demonstrates that the markets for modular homes and for HUD-code manufactured homes, though overlapping, are basically distinct. Ehrle stated in his affidavit that HUD-code manufactured homes are generally less expensive than modular homes and represent the only viable option for home ownership for those who cannot afford a modular home. As persuasive as Ehrle's political argument may be to sympathetic policymakers, it precludes a conclusion by this court that, because it will result in a higher proportion of in-state goods than out-of-state goods in the market, it has a discriminatory effect. There are two markets at work, and plaintiffs have not presented evidence demonstrating that a restriction on HUD-code manufactured homes will result in a corresponding increase in sales of modular homes. In other words, plaintiffs have not presented evidence that the two types of housing are substitutes, despite their argument that distinguishing between them for purposes of maintaining property values is irrational and ineffective.

Appendix B

Because Ordinance 259 has only an incidental effect on interstate commerce, the district court was correct to apply the balancing test outlined in *Pike*. Plaintiffs contend that the ordinance fails this test because the burden on interstate commerce is clearly excessive to the local interest served. In support, plaintiffs cite lost sales of HUD-code manufactured homes in the City during the 1991-94 period of over $900,000. Plaintiffs also contend that the City has not demonstrated that preserving property values is a legitimate governmental interest, that the ordinance does not actually achieve the stated objective,[9] and that rather than impose an outright ban on all HUD-code manufactured homes not placed in trailer parks, the City could have adopted the less restrictive alternative of requiring that such homes comply with certain aesthetic requirements.

We conclude that plaintiffs have not produced evidence sufficient to create a genuine issue of material fact with respect to whether the burden on interstate commerce clearly exceeds the local benefits. It is not evident that plaintiffs have

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9. Plaintiffs rely on Ehrle's affidavit testimony that mobile homes have dramatically improved in quality and appearance and that "numerous studies" of the impact of manufactured housing on land values have concluded that property values are not diminished by adjacent HUD-code manufactured housing. It appears, however, that plaintiffs offered no such actual studies. Plaintiffs did produce the report of one appraiser who concluded that the placement of a HUD-code manufactured home on Waller's lot would not adversely affect surrounding property values. The City countered with the affidavit of another appraiser, who stated that the presence of a mobile home or HUD-code manufactured home in a residential neighborhood of conventional site-built homes does have a negative impact on property values. The City's appraiser also stated that Fannie Mae guidelines require that when appraising a conventional site-built home, an appraiser mention in the report the presence of any mobile homes or HUD-code manufactured homes in the neighborhood.

demonstrated a *burden* on interstate commerce at all. The ostensible burden consists of lost sales of HUD-code manufactured homes manufactured by out-of-state firms for placement on individual, privately-owned lots in the City of Nederland. In-state counterpart firms will suffer proportional losses. As the Supreme Court stated in *Exxon*, "the [Commerce] Clause protects the interstate *market*, not particular interstate firms, from prohibitive or burdensome regulations." 437 U.S. at 127-28, 98 S.Ct. at 2214-15 (emphasis added). Plaintiffs have not demonstrated that whatever mode of housing is built in lieu of HUD-code manufactured homes, it will be provided by in-state suppliers. Because plaintiffs have not raised a genuine issue as to whether any burden the ordinance may impose on interstate commerce is clearly excessive to the local benefits,[10] the district court did not err in granting summary judgment on this claim.

C. *Takings*

The authority of state and local governments to enact land use restrictions has long withstood constitutional scrutiny. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926). "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413, 43 S.Ct. 158, 159, 67 L.Ed. 322 (1922). Such authority is not,

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10. There can be no dispute that the governmental interest at stake is legitimate. Maintenance of property values has long been recognized as a legitimate objective of local land use regulation, and the Texas Supreme Court has expressly held that a local ordinance regulating the location of mobile homes is a land use ordinance properly within the local police powers. *See City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex.), *cert. denied*, 459 U.S. 1087, 103 S.Ct. 570, 74 L.Ed.2d 932 (1982).

however, without limits. Pursuant to the Takings Clause of the Fifth Amendment, made applicable to the states through the Fourteenth Amendment, a land use regulation constitutes a taking if the ordinance "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land." *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980) (citations omitted); *see also Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).[11]

In holding that Ordinance 259 does not constitute a compensable taking, the district court reasoned that even if the ordinance precluded the economically optimal use of Waller's land, it neither deprived him of any fundamental attributes of property ownership nor prevented him from making beneficial use of the property. We agree that plaintiffs have not made an evidentiary showing sufficient to create a genuine issue as to the existence of a taking.

Plaintiffs contend that the district court erred in its takings analysis because (1) it improperly "found" that Waller had not been deprived of all economically viable use of his property and (2) it applied the wrong legal standard. Plaintiffs argue that the district court should have applied "heightened scrutiny," under *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 107

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11. The exception to this formulation is the category of *per se* takings, such as a permanent physical occupation of the property, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), or deprivation of *all* economically beneficial use, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Plaintiffs do not contend that Ordinance 259 constitutes a *per se* taking.

S.Ct. 3141, 97 L.Ed.2d 677 (1987), because the City disproportionately singled out Waller. Plaintiffs contend that under *Nollan,* the ordinance cannot stand because it impermissibly attempts to "extract benefits" from the regulation of Waller's land and because it lacks the requisite "closeness of fit" between means and ends. Plaintiffs make no argument and cite no evidence concerning the harm to Waller, other than to state that such harm is "obvious."

The evidence before the court in no way indicates that Waller has been singled out as was the landowner in *Nollan.* Ordinance 259 is a general zoning regulation that applies evenhandedly to entire areas of the City, unlike the challenged requirement in *Nollan* that conditioned a building permit upon the applicant's granting of an uncompensated, permanent, public access easement to the city. *Id.* at 828, 107 S.Ct. at 3143; *see also Dolan,* 512 U.S. at __, 114 S.Ct. at 2316 (distinguishing *Nollan* and *Dolan* from land use cases in which the regulations involve "essentially legislative determinations classifying entire areas of the city"). The Nederland ordinance does not "extract benefits" from Waller in the *Nollan* sense of requiring some dedication of property to the city. Accordingly, even assuming that *Nollan* establishes a distance standard in cases of constitutionally suspect conditions, this is not such a case.

We therefore turn to the first question posed under *Agins* — whether Ordinance 259 substantially advances a legitimate state interest. *Agins,* 447 U.S. at 260, 100 S.Ct. at 2141. Ordinance 259 restricts the placement of manufactured housing inside the City's limits to trailer parks in an effort to prevent haphazard placement of such housing throughout the City and thereby prevent a concomitant decline in property values. Conservation of property values is a legitimate governmental interest well

within the broad scope of the police power. *See Berman v. Parker,* 348 U.S. 26, 33, 75 S.Ct. 98, 102, 99 L.Ed. 27 (1954); *Corn v. City of Lauderdale Lakes,* 997 F.2d 1369, 1375 (11th Cir. 1993), *cert. denied,* __ U.S. __, 114 S.Ct. 1400, 128 L.Ed.2d 73 (1994). Ordinance 259, moreover, substantially advances this interest. Here, the City determined that manufactured housing would detrimentally affect property values if scattered throughout a municipality. Restricting manufactured housing to trailer parks directly responds to this legitimate concern.

We must now determine whether enforcement of the ordinance interferes with Waller's reasonable use of his property to such a degree as to constitute a taking. This is necessarily a fact-intensive, case-by-case inquiry that takes account of such relevant factors as the extent to which the regulation frustrates distinct investment-backed expectations and whether it completely denies all beneficial use of some portion of the property. *Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 124-28, 98 S.Ct. 2646, 2659-61, 57 L.Ed.2d 631 (1978). In many contexts, some adverse effect on economic value will be tolerated in the interest of promoting the health, safety, welfare, or morals of a community. *Id.* In this case, plaintiffs have made no showing of harm sufficient to declare enforcement of Ordinance 259 a taking. Plaintiffs have alleged neither physical invasion nor interference with distinct investment-backed expectations, and the evidence fails to show not only a deprivation of all beneficial use of any part of Waller's property, but also any diminution in the property's value. Summary judgment was therefore appropriate on this claim.

Appendix B

D. *Substantive Due Process*

The relevant inquiry for plaintiffs' substantive due process challenge is whether there existed a rational basis for the City's enactment and enforcement of Ordinance 259. *Shelton v. City of College Station,* 780 F.2d 475, 482 (5th Cir.) (en banc) ("We hold that the outside limit upon a state's exercise of its police power and zoning decisions is that they must have a rational basis."), *cert. denied,* 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566, *and cert. denied,* 479 U.S. 822, 107 S.Ct. 89, 93 L.Ed.2d 41 (1986). An attack against a zoning decision can succeed only with a showing " 'that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.' " *Id.* at 479 (quoting *Vance v. Bradley,* 440 U.S. 93, 110-11, 99 S.Ct. 939, 949-50, 59 L.Ed.2d 171 (1979)). Plaintiffs concede that the exercise of the police power does not offend due process unless the challenged legislation is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid,* 272 U.S. at 395, 47 S.Ct. at 121. Plaintiffs nevertheless contend that the purported rational basis for enacting Ordinance 259 is merely a pretext to mask arbitrary and capricious action that renders the Ordinance unconstitutional. Because it is "at least debatable" whether restricting the placement of mobile homes effectively maintains property values, the district court properly granted summary judgment on this claim. *See Shelton,* 780 F.2d at 483; *Clover Leaf,* 449 U.S. at 464, 101 S.Ct. at 723.

E. *Equal Protection*

Plaintiffs argue that the district court erred in applying the rational basis test to their equal protection claim. Relying on

City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 459-460, 105 S.Ct. 3249, 3264-65, 87 L.Ed.2d 313 (1985) (Marshall, J., concurring in part and dissenting in part), plaintiffs propose that a higher standard of review is appropriate whenever noneconomic or noncommercial legislation affects rights of weighty societal importance. Short of suggesting that housing is a fundamental right, plaintiffs contend that heightened scrutiny is appropriate in this case because property rights are at stake.

We decline to expand the established parameters of heightened scrutiny. Because this case does not involve a suspect or quasi-suspect classification such as race or sex to which heightened scrutiny properly applies, the Equal Protection Clause requires only rationality review.

Rationality review in this context requires merely that the classification drawn by the statute be rationally related to a legitimate state interest. *Schweiker v. Wilson*, 450 U.S. 221, 230, 101 S.Ct. 1074, 1080, 67 L.Ed.2d 186 (1981). The distinction made by Ordinance 259 between trailer coaches and other forms of housing meets this test. The district court did not err in granting summary judgment to defendants on this claim.

F. *42 U.S.C. § 1983*

Section 1983 affords a private cause of action to any party deprived of a constitutional right under color of state law. *See* 42 U.S.C. § 1983. Plaintiffs contend that the district court erred in dismissing their claims under § 1983 pursuant to its grant of summary judgment on all other claims. Having concluded that the district court did not err in granting summary judgment on plaintiffs' constitutional claims, we hold that its dismissal of claims under § 1983 was proper.

Appendix B

G. *Motion to Extend Time*

Finally, plaintiffs argue that because defendants did not file their motion to extend the time for filing a motion for attorneys' fees until after the period of time for filing such a motion had already expired, the district court's grant of defendants' motion was improper. Defendants contend that the granting of a motion to extend time for filing a claim for attorneys' fees is within the discretion of the district court and that plaintiffs were not prejudiced by the late filing because plaintiffs did receive notice of the claim in time to appeal.

Rule 54(d)(2)(B) of the Federal Rules of Civil Procedure provides that "[u]nless otherwise provided by statute or order of the court, the motion [for attorneys' fees] must be filed and served no later than 14 days after entry of judgment." Rule 6 provides that the district court for cause shown may, in its discretion, grant an extension after the expiration of a specified time period if the failure to timely file was the result of excusable neglect. The record in this case discloses no evidence of abuse of discretion.

IV. CONCLUSION

For the foregoing reasons, the judgment of the district court is AFFIRMED.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION ENTERED OCTOBER 16, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. 1:94-CV-398

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Plaintiffs,

VS.

CITY OF NEDERLAND, and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Defendants.

MEMORANDUM OPINION

The Plaintiffs' Motion for Reconsideration asks this court to vacate its summary judgment order of September 7, 1995. Plaintiffs, A.J. Waller and Texas Manufactured Housing Association, Inc., brought this court action alleging various causes of action arising from the City of Nederland's adoption of a 1970 zoning ordinance ("Ordinance 259"). This court reaffirms its finding that Ordinance 259 is a valid exercise of the local police power of the City of Nederland and is not otherwise unlawful as a violation of the plaintiffs' constitutional rights.

Appendix C

Plaintiffs had initially alleged over ten different violations of federal, state, and constitutional law. In this Motion to Reconsider they have re-urged two issues in particular. First, the plaintiffs repeat their contention that the National Manufactured Housing and Safety Standards Act of 1974, 42 U.S.C. §§ 5401-5426, preempts Ordinance 259. Second, the plaintiffs implore the court to "get it right" in regard to its dormant commerce clause analysis. After due consideration of plaintiffs' counsel's florid language on the preemption and dormant commerce clause issues, this court holds that Ordinance 259 does not violate the National Manufactured Housing and Safety Standards Act nor the commerce clause.

I. Alleged Federal Preemption

A. The Use of Faulty Syllogisms

The plaintiffs attempt to show this court by a simplistic syllogism that the court ignored their irrefutable logic. However, the so-called syllogism is erroneous because both the major and minor premises are faulty and not germane to this court's original analysis. The plaintiffs attempt to set up the straw man and, by destruction of the straw man, achieve their desired result. It does not work.

The two presumptions ascribed to the defendants are conveniently numbered in the plaintiffs' motion. Number one is "that the outward appearance of manufactured housing renders it incompatible with 'conventional' housing." Number two is "that mixing visually compatible and incompatible uses of property drives down the value of the former." The summary judgment order in no way relied on these premises.

Rather, this court found that the rationale for Ordinance 259 was the preservation of property values. There are a number of reasons why property values were thought to be jeopardized by mobile homes scattered about the city. The most potent one, however, centered on the very nature of mobile homes (*viz.*, they are mobile). It is not, then, that mobile homes look different or are structurally inferior to stationary homes. It is, instead, that there is a belief on the part of some property owners and the city council that mobile homes reduce land value. What consumers believe is what the market produces. Any policy which the officials could have reasonably believed to be in the best interests of the city will not be disturbed. In the case at bar, safety was not a factor in the adoption of Ordinance 259, let alone its "sole basis" for enactment. *Cf. Scurlock v. City of Lynn Haven*, 858 F.2d 1521, 1515 (11th Cir. 1988).

B. Obfuscation and Trick Questions

A second reason why summary judgment is opposed by the plaintiffs is prompted by an alleged fact question. Plaintiffs assert that the motive of the responsible city officials, as developed in the record, is a question for the trier of fact. Specifically, the plaintiffs point to depositions wherein city officials acceded that a home which was built in accordance with the Southern Building Code would be permissible outside of trailer parks. This is sophistry. There were a number of different points made during the relevant depositions cited by the plaintiffs, but the meat of these soliloquies ran along these lines:

> Plaintiff's Counsel (PC): Would you allow HUD-code manufactured homes outside of trailer parks in Nederland?

Appendix C

City Official (CO): No, that would violate Ordinance 259.

PC: Why do you have Ordinance 259?

CO: Because the mobility of HUD-code manufactured homes can reduce the value of surrounding property if they are not properly zoned.

PC: If a HUD-code manufactured home was constructed to the specifications of the Southern Building Code, would that home be allowed outside of trailer parks in Nederland?

CO: I don't understand.

PC: If a HUD-code manufactured home was constructed like a site-built or modular home, would it be regulated by Ordinance 259?

CO: I guess not.

The plaintiffs point to this type of "evidence" to prove that Ordinance 259 meant to regulate "safety and construction" standards. This sophistry is clever, but not determinative. The fact is that any mobile home which was built to the Southern Building Code would no longer be mobile. Hence, property values would not be jeopardized. It is not that the hypothetical homes are built to the Southern Building Code which makes their location permissible, but rather that they are not mobile. The manner in which the plaintiffs' counsel worded the

questions, however, did not give the witnesses the opportunity to evade his insincere web. The plaintiffs' ability to obfuscate issues in the record does not manufacture issues of fact.

Although one could continue to explain precisely why the record does not support a finding that Ordinance 259 regulates safety, this court is mindful of the exponential growth of the Federal Reporter and Federal Supplement. That said, this court incorporates the findings made in its Memorandum Opinion of September 7, 1995. Ordinance 259 is by no means a "disguised" attempt to regulate the safety or construction of HUD-code manufactured homes. Hence, Ordinance 259 does not violate the National Manufactured Housing and Safety Standards Act of 1974.

II. Alleged Violation of the Dormant Commerce Clause

Plaintiffs' counsel does not mince words when he pronounces in no uncertain terms that "this Court's application of the law was manifestly incorrect." Without apology, I disagree with learned counsel.

"The limitation imposed by the Commerce Clause 'is by no means absolute' and 'the States retain authority under their general police powers to regulate matters of 'legitimate local concern,' even though interstate commerce may be affected." *Maine v. Taylor*, 477 U.S. 131, 138, 106 S.Ct. 2440, 2447, 91 L. Ed.2d 110 (1985). There are two different standards which the Supreme Court has promulgated for courts evaluating legislation under the dormant commerce clause. *Id.* One standard applies where legislation affirmatively discriminates against interstate commerce, while the other standard applies where the legislation burdens interstate commerce incidentally.

Where, as here, the ordinance in question does not directly discriminate on the basis of interstate commerce, this court is directed by *Pike v. Bruce Church* to apply a balancing test. 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970). Ordinance 259 regulates evenhandedly with only incidental effects on interstate commerce. The burden on interstate commerce is not excessive in relation to the important local interests served by the ordinance. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981). *See also Dorrance v. McCarthy*, 957 F.2d 761, 763 (10th Cir. 1992) (finding that the person challenging an ordinance that regulates evenhandedly bears the burden of showing that the burden on commerce is excessive).

CONCLUSION

The plaintiffs invite this court to re-sculpt the contours of federal constitutional law. Specifically, they wish this court to overrule Supreme Court cases in literally half a dozen areas of jurisprudence. A representative sampling of these cases includes *Pike v. Bruce Church*, *Euclid v. Ambler Realty Company*, 272 U.S. 265, 47 S.Ct. 114, 71 L.Ed. 303 (1926), *Vance v. Bradley*, 440 U.S. 93, 110-11, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979), *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d (1966), *Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980), and *Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed.2d 405 (1976). This court declines the plaintiffs' invitation.

SIGNED this 9th day of October, 1995.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ENTERED OCTOBER 16, 1995

NO. 1:94-CV-398

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Plaintiffs,

VS.

CITY OF NEDERLAND, and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Defendants.

ORDER

Before the court is the Plaintiffs' Motion for Reconsideration. After considering the Motion, and in accordance with the Memorandum Opinion of this date, this court DENIES said Motion.

SIGNED this 9th day of October, 1995.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, BEAUMONT DIVISION ENTERED SEPTEMBER 7, 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

NO. 1:94-CV-398

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Plaintffs,

VS .

CITY OF NEDERLAND, and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Defendants.

MEMORANDUM OPINION

Before this court is the City of Nederland and the Zoning Board of Appeals of the City of Nederland's Motion for Summary Judgment. Plaintiffs, A.J. Waller and Texas Manufactured Housing Association, Inc., brought this court action alleging approximately a dozen causes of action arising from the City of Nederland's adoption of a 1970 zoning ordinance ("Ordinance 259"). Plaintiffs charge Defendants with various Constitutional torts as well as with denying Plaintiffs of both substantive and procedural due process, equal protection, just compensation, privileges and immunities, and privacy. Plaintiffs also claim that both federal and state law has

preempted the subject matter of Ordinance 259. For the reasons stated below, this court finds that Ordinance 259 is a valid exercise of the local police power of the City of Nederland and is not otherwise unlawful as a violation of Plaintiffs' constitutional rights. This court is not convinced by the Defendants' claim that res judicata should bar Mr. Waller or this suit from proceeding due to the previous resolution by Final Order of the state court litigation. In any event, summary judgment for the defendants is warranted on the merits of this dispute. Therefore, this court GRANTS the Defendant's Motion for Summary Judgment and DISMISSES the Plaintiffs' claims against the Defendants.

I. BACKGROUND

Texas Manufactured Housing Association, Inc. ("Texas Housing") and Mr. Waller brought suit to invalidate Nederland's alleged discriminatory and unconstitutional zoning ordinance which restricts the placement of mobile homes to limited areas within the city. Plaintiffs' complaint alleges that Ordinance 259 violates the Fifth and Fourteenth Amendments of the Constitution; the National Manufactured Housing and Safety Standards Act of 1974, 42 U.S.C. §§ 5401-5426; and the Texas Manufactured Housing Standards Act, Article 5221f, Tex.Rev. Civ.Stat. Plaintiffs further contend Ordinance 259 impermissibly burdens interstate commerce causing Texas Housing to incur damages.

In 1970, the City of Nederland adopted Ordinance 259 which regulates the placement and installation of "trailer coaches" within the city limits. In 1991, Mr. Waller applied for a permit to install a HUD-code manufactured home (this is the term used for a mobile home manufactured to HUD standards) on his private property. In 1992, Mr. Waller again applied for a

building permit to install a HUD-code manufactured home on his property. Both requests were denied. Subsequently, Waller brought a state court action against the City of Nederland. On April 15, 1994, the 136th Judicial District Court of Texas issued an order stating that the City of Nederland was entitled to enforce its ordinances as long as those ordinances did not conflict with the Texas Act.

On April 18, 1994, Mr. Waller once again applied for a permit to install a HUD-code manufactured home. In denying the request, Nederland's Building Official was of the opinion that a HUD-code manufactured home was considered a trailer coach, and, therefore, should not be permitted under Ordinance 259. Mr. Waller then filed an appeal with the Zoning Board of Appeals of the City of Nederland. The Zoning Board also denied his request. Mr. Waller, along with Texas Housing, then initiated suit in this court seeking damages and injunctive relief enjoining Nederland from enforcing Ordinance 259. Jurisdiction over this matter is conferred by the operation of 28 U.S.C. sections 1331 and 1343(a).

II. ANALYSIS

A. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the moving party is able to demonstrate that the pleadings, depositions, affidavits, and other appropriate evidence available to the court establish that there are no genuine issues of material fact and that the moving party is entitled to summary judgment as a matter of law. Fed. R. Civ. P. 56(c); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 323-25, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *Matsushita Electric*

Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 585-88, 106 S.Ct. 1348, 1355-56, 89 L.Ed.2d 538 (1986). There are no genuine issues of material fact "[w]here the record taken as a whole could not lead a rational trier of fact to find for a non-moving party . . . ." *Leonard v. Dixie Well Service Supply, Inc.*, 828 F.2d 291, 293-94 (5th Cir. 1987).

This court views the evidence and all factual inferences from that evidence in the light most favorable to the party opposing summary judgment. *Eastman Kodak v. Image Technical Services*, 504 U.S. 451, 456, 112 S.Ct. 2072, 2077, 119 L.Ed.2d 265 (1992); *Matsushita*, 475 U.S. at 487, 106 S.Ct. at 1356.

B. THE PREEMPTION CLAIMS

The Plaintiffs claim that Ordinance 259 encroaches upon an area expressly preempted by both federal and state law. Because the statutory language in question differs somewhat, each statute will be discussed in turn.

1. The Federal Act

The lines of inquiry are identical whether it be either state statute or local ordinance which is being scrutinized against the preemptive force of federal law. *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638, 93 S.Ct. 1854, 1862, 36 L.Ed.2d 547 (1973). Federal preemption analysis is foremost an exercise in enforcing the Supremacy Clause. The reach of the federal action in question is determined by congressional intent regarding statutory construction. *Gushke v. City of Oklahoma City*, 763 F.2d 379, 383 (10th Cir. 1985). Congress can make it easy to recognize how much, if any, state law is to be preempted through the use of express preemptive language.

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Michigan Canners and Freezers Ass'n, Inc. v. Agricultural Marketing and Bargaining Board, 467 U.S. 461, 104 S.Ct. 2518, 81 L.Ed.2d 199 (1984). Express preemptive language may be found on the face of a statute, in its legislative history, or in regulations promulgated pursuant to the law. *Howard v. Uniroyal, Inc.*, 710 F.2d 1552, 1556 (llth Cir. 1983). Preemptive intent may also be inferred when Congress legislates comprehensively, thus occupying an entire field of regulation, or when state law actually conflicts with federal law thereby standing as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Michigan Canners*, 467 U.S. at 169, 104 S.Ct. at 1523.

The preemptive intent of Congress for the National Manufactured Housing and Safety Standards Act is expressly set out in section 5403(d) of the Act itself:

> Whenever a Federal [mobile] home construction and safety standard established under this chapter is in effect, no State or political subdivision of a State shall have authority either to establish, or to continue in effect, with respect to any [mobile] home covered, any standard regarding construction or safety applicable to the same aspect of performance of such [mobile] home which is not identical to the Federal [mobile] home construction and safety standard.

Congress made clear vis-a-vis the areas in which it is acting (here, *construction* and *safety),* federal mobile home standards are to be the only permissible ones. To understand the scope of preemption, however, the court often must look beyond the

words of preemption to the very purposes of federal statute. The National Manufactured Housing and Safety Standards Act's express purpose is to reduce injuries and risks resulting from manufactured home accidents and to improve the quality of manufactured homes. 42 U.S.C. § 5401. The Department of Housing and Urban Development regulations adopted pursuant to the Act establish performance requirements, *see* 24 C.F.R. § 3280.1(b), in order to protect the public against any unreasonable risks of accidents due to the design or construction of mobile homes. *See id.* § 3280.1(a)(18).

Ordinance 259 is a land use law enacted to preserve property values within the City of Nederland. Unlike the local zoning law struck down in *Scurlock v. City of Lynn Haven*, Nederland is not attempting to exclude the plaintiff's mobile home from areas of the city "based solely on [the city's] safety code." 858 F.2d 1521, 1515 (11th Cir. 1988). The court in *Lynn Haven* held that the city "cannot attempt land use and planning through the guise of a safety provision in an ordinance when that safety requirement is preempted by federal law. *See Pacific Gas & Electric Co. v. State Energy Resources Commission*, 461 U.S. 190, 204-216, 103 S.Ct. 1713, 1722-28, 75 L.Ed.2d 752 (1983)." *Id.* at 1525.

In the case at bar, the Plaintiffs claim that Nederland believes its Standard Building Code is superior in terms of safety construction to that of the HUD-code for manufactured homes. This allegation that Ordinance 259 is a "disguised attempt to regulate construction or safety" is wholly without colorable support in the record. Plaintiffs seem to mistakenly relate the issue of preemption with their claim that the ordinance is arbitrary and capricious. This ordinance, whether arbitrary or not, does not relate in any way to construction and safety

standards. Ordinance 259, a zoning law regulating the location of HUD-code manufactured homes and other mobile homes, is not preempted by the National Manufactured Housing and Safety Standards Act.

2. The State Act

State preemption analysis begins with article XI, sec. 5 of the Texas Constitution which commands that no ordinance "shall contain any provision inconsistent with . . . the general laws enacted by the Legislature of this State." *See also Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex. 1993).

Plaintiffs claim that Ordinance 259 conflicts with the Texas Manufactured Housing Standards Act (TMHSA), Article 5221f, Tex. Rev. Civ. Stat. The legislative reach of this statute can be easily defined. The TMHSA attempts to encourage the construction of housing for the state's citizens and improve the safety and general welfare of purchasers of manufactured housing in the state. Art. 5221f § 2.

The Florida state preemption issue in *Lynn Haven* was quite different than the preemption issue in this suit. Florida had a state statute which expressly prohibited zoning classifications based upon the mobility of a dwelling. Texas has no such statute.

In *City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex.), *cert. denied*, 459 U.S. 1087 (1982), a court for the first time addressed the issue of a municipality's restriction on the location of manufactured homes in Texas. The court held "that such regulation of mobile homes represents a valid exercise of a municipality's police power." *Id.* at 793. The Texas Supreme

Court found that the ordinance in question bore an adequate relationship to the public health, safety, morals or general welfare.

Plaintiffs claim that section 4A of the TMHSA strips Texas municipalities of their zoning power vis-a-vis HUD-code manufactured homes. This is a misreading of section 4A of bewildering proportions. The plain meaning of section 4A, let alone the holding of *Comeau*, makes clear a municipality's power to regulate HUD-code manufactured homes:

> An incorporated city may prohibit the installation of a mobile home for use or occupancy as a residential dwelling within its corporate limits : . . . Upon application the installation of HUD-Code manufactured homes shall be permitted as residential dwellings in those areas determined appropriate by the city . . . .

The TMHSA does allow existing mobile homes to be switched out for HUD-code manufactured homes. The TMHSA also forbids cities from taking action against mobile homes which were lawfully located in a city before a zoning law went into effect. In short, the Texas legislature decided to forbid cities from zoning residents out of their established housing and to allow persons who currently were lawfully residing in a mobile home to replace that mobile home with a HUD-code manufactured home. The Texas legislature, however, provided not as much as a hint that municipalities were no longer free to regulate the location of HUD-code manufactured homes. Indeed, the construction of the statute makes clear that cities need only allow HUD-code manufactured homes in areas "determined

appropriate"; the statute does not command cities to allow the HUD-code manufactured homes in "all areas" of their cities. Ordinance 259 is not preempted by the Texas Manufactured Housing Standards Act.

C. FOURTEENTH AMENDMENT CLAIMS

Municipalities may zone land to pursue any number of legitimate objectives related to the health, safety, morals or general welfare of the community. Ever since the Supreme Court case of *Euclid v. Ambler Realty Company,* 272 U.S. 265, 47 S.Ct. 114, 71 L.Ed. 303 (1926), the power of municipalities to enact zoning ordinances has been fully upheld.

1. Due Process Claims

a. Substantive Due Process

Federal courts reviewing local zoning decisions are to utilize the same constitutional standards employed in reviewing statutes enacted by state legislatures. *Shelton v. City of College Station,* 780 F.2d 475, 479 (5th Cir. 1986), *cert. denied,* 477 U.S. 905, 106 S.Ct. 3276, 91 L.Ed.2d 566 (1986). Because the Plaintiffs in the case at bar are challenging Nederland's legislative judgment, the Plaintiffs are not asked to simply show that a disputed historical fact is more likely than not to be true; rather, they must prove that "the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker." *Vance v. Bradley,* 440 U.S. 93, 110-11, 99 S.Ct. 939, 949, 59 L.Ed.2d 171 (1979).

Federal judicial interference with a zoning ordinance is

proper only if the governmental body could have no legitimate reason for its decision. *See Shelton* at 483. "The key inquiry is whether the question is 'at least debatable' . . . . If it is, there is no denial of substantive due process as a matter of federal constitutional law." *Id.* (citation omitted).

To prevail at trial, the Plaintiffs must establish Nederland's belief that, if left unregulated as to location, HUD-code manufactured homes may reduce surrounding property values is irrational. Defendants, however, have been able to show there to be no genuine issue of fact as to the rationality of their property value judgment.

This court finds as a matter of law that a reasonable individual could argue that mobile homes may adversely affect the property values of surrounding areas. Because Nederland has "at least debatable" grounds for distinguishing mobile homes from site-built and modular homes, as a matter of constitutional law, it did not act arbitrarily and capriciously nor deny Plaintiffs substantive due process.

The court need not focus upon record facts and may look merely to hypothesized purposes rather than insisting Defendants prove their actual purpose, or basis of their decision and the rationality of that basis for decision. *Shelton*, 780 F.2d 480, 481.

2. Equal Protection and Right to Travel

The Plaintiffs' equal protection claim likewise fails under Fifth Circuit precedent. If the legislative purpose is legitimate, an equal protection challenge fails if it is at least debatable that the ordinance in question has a rational relationship to the

legislative purpose. *See Stern v. Tarrant County Hospital District*, 778 F.2d 1052, 1056 (5th Cir. 1985), *cert. denied*, 476 U.S. 1108, 106 S.Ct. 1957, 90 L.Ed.2d 365 (1986); *Kaplan v. Clear Lake City Water Authority*, 794 F.2d 1059 (5th Cir. 1986); *Katzenbach v. Morgan*, 384 U.S. 641, 657, 86 S.Ct. 1717, 1727, 16 L.Ed.2d (1966). "The constitutional test for rationality of a legitimate classification, whether the classes be distinguished in the text of the law or in its administration, is whether any rational decisionmaker could have so classified." *Stern*, 778 F.2d at 1056 (citations omitted).

3. Takings and Procedural Due Process

A reasonable ordinance which may result in the reduction of property values does not itself create a compensable taking. The typical municipal land use ordinance enacted after an individual has purchased the land in question does not constitute a taking. *See Agins v. City of Tiburon*, 447 U.S. 255, 100 S.Ct. 2138, 65 L.Ed.2d 106 (1980). Even if the economically optimal use of Mr. Waller's land is foreclosed, the fundamental attributes of ownership remain intact. Mr. Waller can continue to make beneficial use of his land. Hence, Ordinance 259 does not constitute a compensable taking.

4. The Right to Privacy

As tempting as it is for this court to announce new personal rights which are fundamental or implicit in the concept of ordered liberty, it declines to do so. If it were to develop new and progressive rights to privacy, the Plaintiffs' claims would neither be recognized in this new jurisprudence nor as falling under any traditionally protected penumbra. *See Paul v. Davis*, 424 U.S. 693, 713, 96 S.Ct. 1155, 1166, 47 L.Ed. 405 (1976).

Appendix D

D. THE INTERSTATE COMMERCE AND RIGHT TO TRAVEL CLAIMS

Nederland's zoning scheme does not differentiate between HUD-code homes built within the state and those built outside the state. Indeed, Ordinance 259 is simply meant to conserve property values. Hence, Ordinance 259 is facially nondiscriminatory and is designed to meet a legitimate social welfare objective. For Commerce Clause analysis in these circumstances, the court is reluctant to intervene:

> Where the [government enactment] regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. . . . If a legitimate local purpose is found, then the question becomes one of degree.

Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S.Ct. 844, 847, 25 L.Ed.2d 174 (1970) (citation omitted). This court holds that Ordinance 259 is not unduly burdensome on interstate commerce in light of its limited effect on free movement of interstate commerce and the traditional state police power concerns the ordinance addresses. *See, e.g., Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 101 S.Ct. 715, 66 L.Ed.2d 659 (1981).

Furthermore, the claims regarding Ordinance 259's burden on the right to travel are baseless. Right to travel generally implicates residency requirements. Here, the law in question

puts an insignificant burden, if any whatsoever, on individuals' right to travel interstate.

CONCLUSION

Federal courts are not a forum for the review of every run-of-the-mill land-use dispute. *Lemke v. Cass County, Nebraska*, 846 F.2d 469 (8th Cir. 1987); *Delta Environmental Services, Inc. v. Plaquemines Parish Government*, 708 F.Supp. 136, 141 (E.D. La. 1989). These political disputes do not rise to the level of Constitutional significance.

Even if Nederland's government made an unwise decision or their decision-making process was not as thorough as Plaintiffs would like, the bottom line is this: the judiciary will defer to political decisions regarding the health, safety, morals and welfare of the citizenry which are at least minimally reasonable and do not otherwise insidiously discriminate or infringe upon fundamental interests.

The two legislative enactments in this case preempt the field of mobile home regulation as to construction, safety, and installation of mobile homes. These statutes do not conflict with Nederland's ordinance regulating the **location** of mobile homes. Hence, Ordinance 259 is hereby upheld as compatible with state and federal legislation.

If general improvements in the appearance and quality of manufactured mobile homes are indeed as Plaintiffs contend, then their resources would be better invested in championing the power of their argument. In so doing, they may persuade municipalities like defendant Nederland to alter ordinances

regarding such restrictions. Such changes, however, are political matters to be determined by the legislative not judicial process.

SIGNED this 7th day of September, 1995.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

ENTERED SEPTEMBER 7, 1995

NO. 1:94-CV-398

TEXAS MANUFACTURED HOUSING ASSOCIATION, INC. and A.J. WALLER, SR.,

Plaintiffs,

VS .

CITY OF NEDERLAND, and ZONING BOARD OF APPEALS OF THE CITY OF NEDERLAND,

Defendants.

ORDER

Before the court is the defendants' Motion for Summary Judgment. After considering the Motion, and in accordance with the memorandum of this date, this court is of the opinion that the Motion should be GRANTED. It is therefore ORDERED ADJUDGED and DECREED that the plaintiffs, A.J. Waller and Texas Manufactured Housing Association, take nothing by reason of their complaint.

SIGNED this 7th day of September, 1995.

s/ Howell Cobb
HOWELL COBB
UNITED STATES DISTRICT JUDGE

APPENDIX E — HUD REPORT DATED MAY 2, 1995

THE NATIONAL HOMEOWNERSHIP STRATEGY: PARTNERS IN THE AMERICAN DREAM

U.S. Department of Housing and Urban Development
May 1995

Appendix E

THE WHITE HOUSE

WASHINGTON

May 2, 1995

Our nation's greatest promise has always been the chance to build a better life. For millions of America's working families throughout our history, owning a home has come to symbolize the realization of the American Dream. Yet sadly, in the 1980s, it became much harder for many young families to buy their first homes, and our national homeownership rate declined for the first time in forty-six years. Our Administration is determined to reverse this trend, and we are committed to ensuring that working families can once again discover the joys of owning a home.

This past year, I directed HUD Secretary Henry G. Cisneros to work with leaders of the housing industry, with nonprofit organizations, and with leaders at every level of government to develop a plan to boost homeownership in America to an all-time high by the end of this century. *The National Homeownership Strategy: Partners in the American Dream* outlines a substantive, detailed plan to reach this goal. This report identifies specific actions that the federal government, its partners in state and local government, the private, nonprofit community, and private industry will take to lower barriers that prevent American families from becoming homeowners. Working together, we can add as many as eight million new families to America's homeownership rolls by the year 2000.

Expanding homeownership will strengthen our nation's families and communities, strengthen our economy, and expand

this country's great middle class. Rekindling the dream of homeownership for America's working families can prepare our nation to embrace the rich possibilities of the twenty-first century.

s/ Bill Clinton

Appendix E

Foreword

I am honored to present *The National Homeownership Strategy* for the consideration of the American people. The strategy was prepared in response to a request from President Clinton. On Nov. 5, 1994, the President called for a national effort to lift America's homeownership rate to an all-time high by the end of the century. He directed me to develop a National Homeownership Strategy to reach this goal and to form a national partnership of the private, public, and community sectors to carry out the strategy.

Homeownership is the American dream, but the dream has been fading since 1980, when the national homeownership rate slipped into decline after 46 years of steady growth. Although the homeownership rate has risen over the past 2 years, it is still well below its historic peak. Reviving the trend toward greater homeownership is vital to our Nation's families, communities, and economic prosperity.

The goal of this strategy is ambitious: to generate up to 8 million additional homeowners from 1995 through the year 2000. The strategy recommends a series of concerted actions to help middle-income and low-income families, racial and ethnic minorities, families with children, and young adults overcome current barriers to homeownership. These actions will be undertaken by private industry, national nonprofit organizations, nonprofit community groups, and Federal, State, and local governments working in cooperation at the national, State, and local levels.

Working as partners in this way, we can translate strategy into achievement, making the dream of homeownership a reality

for millions of hard-working people and building a better future for all Americans.

s/ Henry Cisneros
Henry Cisneros
Secretary of Housing and
Urban Development

Appendix E

* * *

Eliminate Regulatory and Financing Barriers to the Availability of Manufactured Housing

STRATEGY: The partnership should initiate a series of major regulatory, administrative, legislative, research, and educational initiatives to eliminate barriers to the availability of quality, affordable manufactured housing and to its acceptance among State and local regulatory agencies and financing entities.

Issues and Impediments: Manufactured housing is a major source of affordable housing, especially for many lower and moderate-income families living in rural and suburban areas. In 1994 over 300,000 manufactured homes — one out of every five single-family homes built — were added to the national housing stock.

Most purchasers of manufactured homes who would not otherwise be able to purchase a home express satisfaction with their home. Yet, prospective homebuyers face Federal, State, and local regulatory, as well as financing, barriers. Some of these barriers stem, in part, from the public's perception of the quality, safety, and durability of manufactured housing.

There is general support among the homebuilding industry, consumer groups, and government regulators that the following initiatives will increase the availability of manufactured housing:

* Continuation of a Federal preemptive building code and a uniform enforcement system to facilitate interstate commerce and ensure affordability.

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* Fair and timely administration of construction standards.

* Strong Federal-State regulatory cooperation.

* Establishment and enforcement of State installation standards and other appropriate regulatory programs.

* Effective, market-driven consumer warranties.

* Access to the full range of housing finance resources.

Manufactured housing has a unique status — it is the only housing built under a Federal preemptive code. As such it is the only form of housing in which the Federal Government, working in cooperation with private industry and State and local governments, plays the leading role in the construction process. The performance nature of the HUD code, with emphasis on value engineering and uniform enforcement, has allowed a range of technological innovations in the use of materials and procedures.

> North Carolina has one of the most comprehensive and successful State programs for manufactured housing in the nation. Key elements of the program include:
>
> Consumer Complaint Tracking — Staff process and handle complaints.
>
> Training in Home Setup and Anchoring — The State trains dealers and sets up companies on proper techniques for installing and handling.

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Setup Standards — The State will publish a manual on generic setup requirements for all manufactured homes.

Tie-Down Requirements — North Carolina has required tie down of all manufactured and mobile homes since 1970.

Third-Party System — A third-party inspection agency has been used since 1970 to enforce State restrictions and relicensing requirements.

Warranty Program — North Carolina requires a 12-month warranty on all new homes for "substantial" defects that affect the performance of the home.

Licensing — Manufacturers, setup companies, dealers, and sales persons all must be licensed by State agencies.

For a number of reasons — legal considerations of property title and taxation, sales and distribution systems, zoning and land-use patterns, and family income — most manufactured homes are owned as personal property rather than as real estate. Such ownership requires that these homes be financed with consumer loans rather than with conventional home mortgages. Homebuyers who wish to locate their manufactured homes on land they own or are purchasing deserve access to mortgage financing. There now are barriers to placing a mortgage on a property that includes a manufactured home. Manufactured home financing has evolved along a separate path from other

single-family home financing. As a result, communication between traditional mortgage lenders and the manufactured housing industry has been somewhat limited. Because the demand for locating and financing manufactured homes as real estate is growing, the partnership should work to break down the barriers to mortgage financing so that purchasers of manufactured homes are not unfairly denied access.

Similarly, many urban and suburban communities limit the availability of manufactured homes through regulatory and zoning practices. As a result, manufactured housing has evolved as a primarily rural form. Under many local zoning- and ordinance-related development controls, such housing is either completely excluded because it is not considered a single-family dwelling, or it is relegated solely to manufactured home parks.

Action 23: Regulatory Review of Manufactured Homes

HUD should work in cooperation with State and local governments, private industry, and consumers to review and update its current system of regulating manufactured housing. This effort should include, but not be limited to:

* Adopting a consensus-based process and streamlined procedures to promote timely updates and the development of standards to ensure that manufactured housing is both a safe and affordable form of housing.

* Reviewing the current private inspection system to ensure effective inspections.

* Promoting the availability of consumer protection that is equal to or broader than protection for other forms of single-family residences.

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Action 24: State Participation in Manufactured Homes

> California has led the way in the use of manufactured homes in traditional subdivisions. As a result of State legislation permitting HUD-code homes to be developed in single-family neighborhoods, there has been greater public acceptance of manufactured housing.
>
> For example, using local redevelopment funds, the Poway Redevelopment Agency in Poway, California, developed the Haley Ranch Estates. The Haley Ranch Estates consist of 65 rental units starting at $250 a month, which is well within reach of families earning low and moderate incomes.

The partnership should improve and strengthen the role of State governments in manufactured housing. For example, partners should encourage more States to assume regulatory responsibilities, develop appropriate installation standards and inspection procedures, and evaluate the adequacy of consumer protection programs.

Action 25: Cooperative Research for Manufactured Homes

The partnership should initiate cooperative research and demonstration efforts to accelerate the development of technologies for manufactured housing. Specifically, HUD and the manufactured home industry should:

* Evaluate new technologies for potential use in the next

generation of manufactured homes to achieve efficiency, affordability, quality, and durability.

* Initiate cooperative research efforts to develop cost-effective and safe installation technologies to obtain private financing.

* Initiate education and dissemination efforts to accelerate research into innovative, efficient, and effective construction practices.

Action 26: Manufactured Home Industry Initiatives

The partnership should determine the feasibility of establishing programs to improve nationwide installation standards and enforcement and generate an industrywide consensus on warranties that offer consumers comprehensive coverage on both the manufactured home and its installation. Working together, home manufacturers, retailers, and other industry segments should:

* Provide technical assistance to State governments and encourage them to establish installation standards and corresponding enforcement programs.

* Identify and promote voluntary industry guidelines for market-driven warranties offering consumers comprehensive coverage of manufactured homes that includes installation.

Action 27: Zoning and Land Development Reform for Manufactured Homes

The partnership should identify and promote zoning and land development policies that are more conducive to manufactured

housing. As part of this initiative, partners should develop model legislation for States and localities to adopt that prohibits exclusion of manufactured housing solely on the basis of HUD certification. The partners also should produce design and land development criteria and guidance materials for use by housing developers and local governments, to facilitate inclusion of manufactured housing in their jurisdictions. To supplement these efforts, the partnership should offer a cooperative program of education and technical assistance to encourage nationwide acceptance of the model legislation within 6 years.

Action 28: Access to Financing for Manufactured Homes

The partnership should undertake a comprehensive program to expand the availability of financing for purchasers of manufactured homes who wish to own their homes. This program should include:

* An improved and simplified FHA financing program to replace the existing FHA Title I home modernization program.

* Simplification of the FHA 203(b) program for manufactured housing.

* Provision for adequate loans to cover installation of manufactured homes.

* Review of the technical criteria for acceptable manufactured home installation standards.

* Review of the appraisal guidelines of manufactured homes.

* Education and marketing on the availability of mortgage financing for manufactured homes.

* * *